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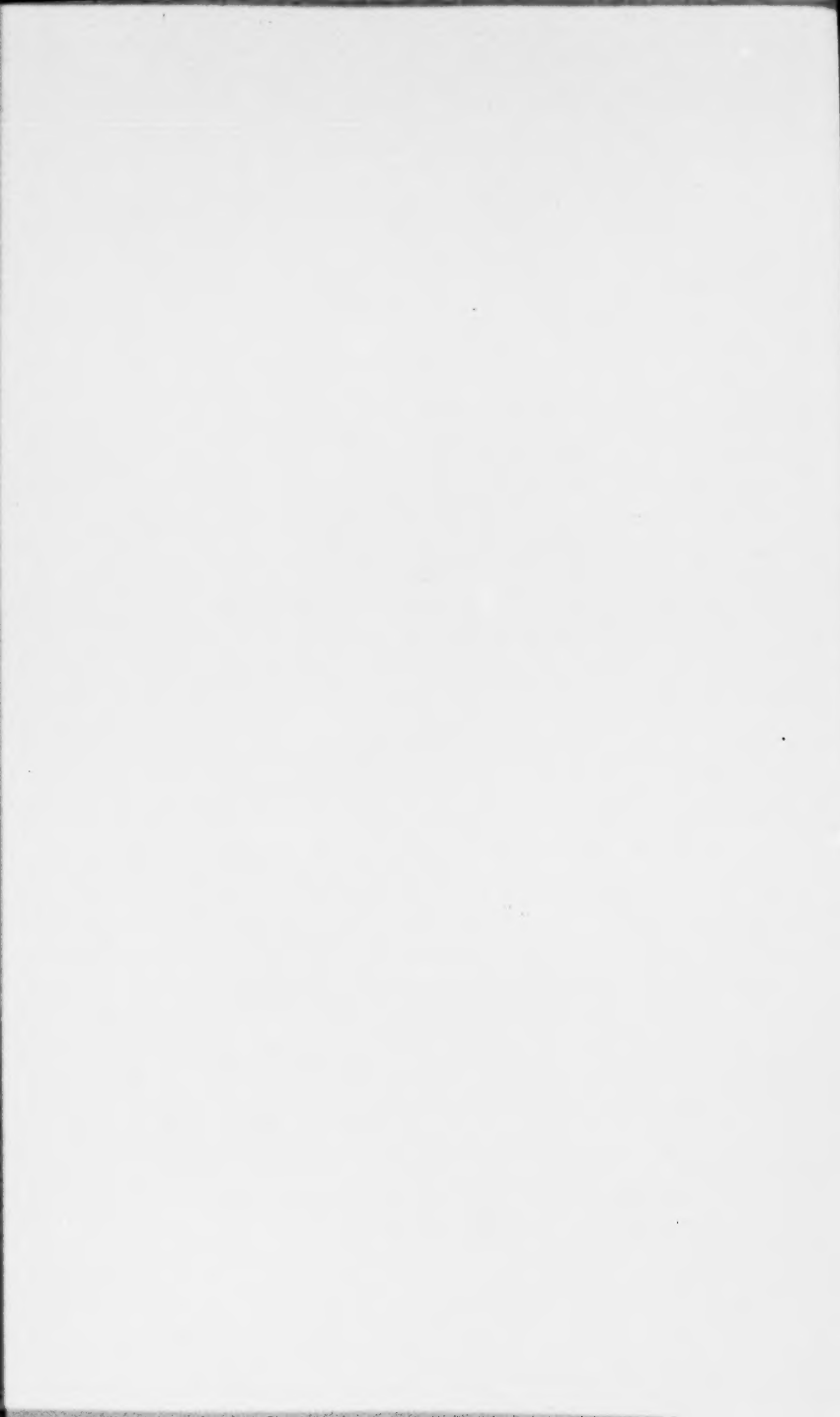
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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 107

MARY BOYD EVANS, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL
REVENUE

No. 108

KATHARINE BOYD MOREHEAD, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL
REVENUE

*ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE THIRD
CIRCUIT*

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW ¹

The majority and minority opinions in the Board of Tax Appeals (R. 13-16) are reported in 42

¹ These cases involve the same questions and were consolidated for hearing and opinion in the Board of Tax Appeals (R. 3, 7, 35), and in the court below (R. 53, 54).

B. T. A. 851. The opinion of the Circuit Court of Appeals (R. 54-59) is reported in 126 F. (2d) 270.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered March 2, 1942 (R. 59, 60). The petition for writs of certiorari was filed May 29, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Each taxpayer executed a trust agreement under which the trustee was directed to accumulate annually and add to corpus a portion of the income not in excess of one-third until the accumulations aggregated \$1,000,000, and to pay over to the trustor during her lifetime so much of the income of the trust fund, or of her share if divided into shares pursuant to the terms of the agreement, as should not be subject to accumulation. The grantor reserved the right to direct the trustee to set aside certain portions of the trust fund as shares for the benefit of her issue and upon her death the income and eventually the principal of the shares was to go to such issue and their descendants. The grantor authorized the trustee, a trust company, to pay over principal to the grantor if, during continuance of the trust, her income should be insufficient for the support and "benefit" of herself and her dependents. Neither taxpayer has

ever directed a division of the trust fund into shares and at no time has the income of either of them been insufficient for the support and benefit of herself and dependents. Were the taxpayers accountable under Section 22 (a), 166 and 167 of the Revenue Acts of 1934 and 1936 for income accumulated in the respective trusts?

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set out in the Appendix, *infra*, pp. 15-24.

STATEMENT

The facts as found by the Board of Tax Appeals (R. 8-13) may be summarized as follows:

The taxpayers are the daughters of Lloyd T. Boyd and his wife, Susan A. Boyd. Lloyd T. Boyd died testate in 1914 and his will was admitted to probate in Wisconsin in 1915. Under the decedent's will and the decree of the County Court for Milwaukee County, Wisconsin, dated December 22, 1915, all of his personal and real property was to be distributed to Susan Boyd for life, or until she remarried, with full right and power to use, enjoy, sell, or dispose of the same during such period. Also, under that will and decree, in the event of Susan Boyd's remarriage, two-thirds of decedent's estate, and upon her death, all of decedent's estate then remaining undisposed of and in her hands, was to be distributed, in equal shares, to the taxpayers. Up to the time of the hearing on these

proceedings Susan Boyd was living and had not remarried and the property of decedent was distributed to her in accordance with the provisions of decedent's will and the decree of the County Court (R. 8-9).

The principal asset embraced in the decedent's estate consisted of 500 shares of stock of the Journal Company. For a period of years up to November 1931, the 500 shares stood in the individual name of Susan Boyd on the records of the Journal Company (R. 9).

Over a period of about three years prior to 1931, Susan Boyd considered the advisability of placing in trust, during her lifetime, a portion of the 500 shares of Journal Company stock for the protection and benefit of each of her two daughters and their children. In the fall of 1931, after several conferences with members of the family and her attorneys, Susan Boyd proposed to transfer her life interest in 166 shares of Journal Company stock to each of taxpayers, with the understanding that they would each immediately thereafter execute the trust instrument which she had had drawn for each of them as grantor, respectively, and each of the taxpayers agreed to such proposal (R. 9).

On November 2, 1931, Susan Boyd, as the first party, and taxpayers, as the second parties, executed an agreement whereby the former transferred all her right, title, and interest in 166 shares of Journal Company stock to each of the

latter two, free from any right, claim, or interest therein of Susan Boyd. By the same agreement taxpayers each agreed that such transfer was in full satisfaction and discharge of any and all obligation of Susan Boyd to divide any portion of her deceased husband's estate with them, except that they retained their vested remainder interest in the remaining 168 shares of Journal Company stock as to which Susan Boyd retained her life interest (R. 9-10).

Pursuant to the understanding with their mother, and under date of November 12, 1931, the taxpayers, each as trustor, executed a separate trust agreement whereby they each, as owner, transferred 166 shares of Journal Company stock to the Wilmington Trust Company, a Delaware corporation, as trustee. Those two trust instruments were drafted pursuant to Susan Boyd's ideas, which were, *inter alia*: (1) To provide a sufficient income for the maintenance of each of her daughters for life and thereafter to their children; (2) to provide for the accumulation and investment of a portion of the trust income to build up the corpus so as to guard against the hazard of the Journal Company stock becoming worthless at some future date; and (3) to provide her daughters with the right, during their lifetime, to direct the trustee to divide the trust fund into shares for the benefit of their respective issue. The two trust instruments contain similar provisions (R. 10).

Each trust purports to be irrevocable.² The corporate trustee is given broad powers to hold, manage, sell, invest, and reinvest the trust corpus and any accumulated income under the direction, or with the consent, of a named "advisor" other than the trustor, except that it may dispose of the trusteed Journal Company stock only upon the written direction or consent of Susan Boyd during her lifetime. The "advisor" and a majority of the adult beneficiaries of the trust may remove the trustee and appoint as a successor a bank or trust company having a capital of at least \$1,000,000 (R. 10).

The corporate trustee, so long as it holds any shares of Journal Company stock, is directed to accumulate annually and add to the corpus a certain portion of the income of the trust fund (including the income from any shares into which the trust fund may be divided for the benefit of the trustor's children) namely, the portion by which the net income of the trust fund shall exceed \$20,000, until the fair market value of such accumulations amount, in the aggregate, to \$1,000,000; but not more than one-third of such net income in any one year shall be so accumulated (R. 11).

The corporate trustee is directed to pay over to the trustor during her life so much of the net income of the trust fund, or of her share in such

² The court below sustained our contention that the trusts were revocable in fact and in law even though they contained no express provision for revocation.

trust fund if the trust fund has been divided into shares, as shall not be subject to accumulation (R. 11).

The trustor, during her lifetime, is given the right to direct the trustee to set aside certain portions of the trust fund as "shares" for the benefit of her issue. Upon the trustor's death the income, and eventually the trust fund or the "shares" thereof, go to the trustor's issue and their descendants (R. 11).

The trust instrument further provides (R. 11-12):

9. (a) It is the intent hereof that the income of the trust fund shall be used only for the personal benefit of the beneficiaries herein named or described and their dependents, and said income shall not be susceptible of anticipation, assignment, attachment, garnishment, seizure or other diversion from said purposes. No part thereof shall be paid to any assignee of any beneficiary.

* * * * *

10. If, during the continuance of this trust, the income currently payable hereunder to or for the benefit of any beneficiary, together with his or her income from other sources, should be insufficient to properly provide for the support, maintenance, benefit and/or education of such beneficiary and his or her dependents, Trustee is authorized and empowered, in its sole discretion, to pay over unto or for the benefit of such benefi-

ary so much of the principal of any part or the whole of the trust fund from which such beneficiary may then be receiving the income or the benefit thereof, as may from time to time be required to make up such insufficiency of income. The receipt of any beneficiary for or evidence of the application to the benefit of any beneficiary of any payment made in conformity with the foregoing provision shall fully discharge Trustee from any further liability in connection therewith.

Since the creation of the trusts the trustee has made no distributions to either of the taxpayers under the provisions of paragraph 10 (R. 12).

Neither of the taxpayers has ever directed a division of the trust fund into "shares" and up to December 31, 1936, all of the income of each trust that was not subject to accumulation has been distributable to them, respectively (R. 12).

During the taxable years each of the taxpayers was the owner of separate property and had income other than that received from the trusts. At no time from the creation of the trusts to the end of the year 1936 has the income of either of the taxpayers, by distributions of income from the trusts and from other sources, been insufficient to provide properly for her support, maintenance, benefit, and/or education, or for that of her dependents (R. 12).

On December 30, 1936, the trustee sold for each trust 33 shares of Journal Company stock for

\$3,500 per share. Such shares were a part of the 500 shares of Journal Company stock embraced in the estate of Lloyd T. Boyd at the appraised value of \$80,000, or \$160 per share (R. 13).

In determining the deficiencies, the Commissioner determined that the taxpayers, as grantors, are taxable upon the entire income of their respective trusts, under Sections 166 and 167 of the Revenue Acts of 1934 and/or 1936. To the distributable and distributed trust income reported by each of taxpayers in their respective individual tax returns, the Commissioner added the following amounts, representing the accumulated trust income for each taxable year, which were reported on the fiduciary returns as being taxable to the trustee (R. 13):

	Amount	Year
Katharine Morehead.....	\$90,441.10	1936
	19,822.98	1934
Mary Evans.....	14,154.53	1935
	60,144.18	1936

Upon review the Board of Tax Appeals held that the taxpayers were not accountable for the accumulated trust income but the court below reversed the decision of the Board.

ARGUMENT

The court below held, correctly, we submit, that the taxpayers are accountable under Sections 166 and 167 of the Revenue Acts of 1934 and 1936

(Appendix, *infra*) for income accumulated in the respective trusts. Section 166 provides that where at any time the power to revest in the grantor title to any part of the corpus of a trust is vested in the grantor or in any person not having a substantial adverse interest, then the income of such part of the trust shall be included in computing the net income of the grantor. Section 167 provides that where any part of the income of a trust is, or in the discretion of the grantor or of any person not having a substantial adverse interest may be, held or accumulated for future distribution to the grantor; or may, in the discretion of the grantor or of any person not having a substantial adverse interest, be distributed to the grantor; then such part of the income of the trust shall be included in computing the net income of the grantor. In the instant cases, the trustee, a trust company, was empowered to pay over to the grantor from time to time any part or all of the principal, including accumulated income, in case the grantor's income from all sources should be insufficient to provide properly for the "support, maintenance, benefit, and/or education" of herself and dependents. The court below took the view that this gave the trustee, which had no substantial adverse interest, discretion almost without limit to distribute the accumulations to the grantors and therefore they are taxable under Sections 166 and 167 even though no such distributions were in fact made. The decision here

is in harmony with the recent decision of the Sixth Circuit in *Wenger v. Commissioner*, decided April 7, 1942, not yet officially reported, but may be found in 1942 C. C. H., Vol. 4, par. 9438, and does not conflict with any case decided by this Court or a Circuit Court of Appeals.

In support of their application for writs of certiorari, the taxpayers urge (Br. 11-15) that their mother was the real grantor of the trusts as far as income received during her life is concerned. This contention was rejected by the court below and we submit that it is without merit. The mother had only a defeasible life interest in the Journal stock and she could not effectively have created the instant trusts without the consent of her daughters, who took vested remainders under their father's will (R. 43). The mother assigned her interest in part of the stock to the daughters who gave at least some consideration therefor; they were the absolute owners of the property when they executed the respective trust agreements as grantors. The record affords no adequate basis for the contention that the taxpayers were merely conduits employed by the mother in setting up the trusts. It is true that the trusts were established in accordance with an understanding with the mother but we submit that this does not compel the conclusion that she was the real grantor. The asserted conflicts are predicated upon differing applications of the principle of looking through form

to substance, and the facts in those cases differ materially from the facts herein. Thus, the instant cases are distinguishable from *Buhl v. Kavanaugh*, 118 F. (2d) 315 (C. C. A. 6th), where the court held that the taxpayer's father had such complete domination and control over the property transferred in trust as to justify the conclusion that he was the grantor even though the trust instrument was in fact executed by his daughter. The cases of *Lehman v. Commissioner*, 109 F. (2d) 99 (C. C. A. 2d), certiorari denied, 310 U. S. 637, and *Commissioner v. Warner* (C. C. A. 9th), decided May 2, 1942, not yet officially reported, but may be found in C. C. H. Inheritance, Estate and Gift Tax Service, par. 10,177, also cited by taxpayers (Br. 10, 14-15), relate to reciprocal trusts and do not conflict with the decision below.

It is contended (Br. 15-18) that the court below usurped the fact-finding function of the Board of Tax Appeals in holding that the trustee could have distributed the trust corpus to the grantors whenever they would benefit from such action. The Board of Tax Appeals did not find as a fact that the word "benefit" was intended to have other than its commonly understood meaning. The taxpayers' contention that the Circuit Court of Appeals *in effect* overruled the Board's finding is predicated upon what they term an *implicit* find-

ing by the Board. In so interpreting the trust agreement, the court correctly decided a question of law and there is no merit to the taxpayers' argument that it exceeded its authority by overturning a finding of fact made by the Board upon the basis of substantial evidence. *Wilmington Trust Co. v. Helvering*, No. 775, 1941 Term, cited by taxpayers (Br. 10, 17-18), presents a situation which is entirely different from the one at bar.

The taxpayers also urge (Br. 18-20) that under no proper construction of the trust agreement could the trustee have distributed to the grantors any of the accumulated income or the principal from which it was earned. But that argument is at variance with the plain provisions of the trust agreement, heretofore alluded to, authorizing the trustee to pay over principal to the grantor for her support or benefit. Since accumulated income was added to principal, it would be included in the funds subject to distribution to the grantor.

In the circumstances, we submit that the instant application should be denied, but if it should be granted, then we will also contend, as we did in the court below, that the grantors are taxable under Section 22 (a) of the Revenue Acts of 1934 and 1936 (Appendix, *infra*). *Helvering v. Clifford*, 309 U. S. 331; *Hormel v. Helvering*, 312 U. S. 552; *Helvering v. Richter*, 312 U. S. 561; *Helvering v. Fuller*, 310 U. S. 69, 76; *Helvering v. Horst*, 311 U. S. 112; *Harrison v. Schaffner*, 312 U. S. 579;

Commissioner v. Buck, 120 F. (2d) 775 (C. C. A. 2d); *Cox v. Commissioner*, 110 F. (2d) 934 (C. C. A. 10th), certiorari denied, 311 U. S. 667.

CONCLUSION

The decision below is correct; there is no conflict; the petition should be denied.

Respectfully submitted.

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